

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Application for Industrial Disability
Retirement of:**

BRIAN S. SIMONS, Respondent,

and

**CALIFORNIA STATE PRISON – CORCORAN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2020-0608 (Statement of Issues)

OAH No. 2020090751

PROPOSED DECISION

Nana Chin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 19, 2021.

Kevin Kreutz, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Brian Scott Simons (respondent) appeared and represented himself. No appearance was made on or behalf of respondent California State Prison – Corcoran, California Department of Corrections and Rehabilitation (Department of Corrections).

Testimony and documentary evidence was received, the record was closed and the matter was submitted for decision on July 19, 2021.

PROTECTIVE ORDER SEALING CONFIDENTIAL DOCUMENTS

Exhibits 7 and 8, the Independent Medical Evaluation and Supplemental Report, were received and contained confidential information. It is impractical to redact the information from these exhibits. To protect respondent's privacy and the confidential personal information from inappropriate disclosure, Exhibits 7 and 8 are ordered sealed. This sealing order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order, provided that the documents are protected from release to the public.

SUMMARY

Respondent did not submit medical evidence to support a determination that he is permanently disabled or incapacitated from performance of his duties as a Correctional Officer for the Department of Corrections on the basis of his right ankle and foot conditions. Therefore, respondent's appeal of CalPERS's denial of his application for disability retirement is denied.

FACTUAL FINDINGS

Jurisdiction and Procedural Background

1. At the time respondent filed his application for retirement, respondent was employed by the Department of Corrections as a Correctional Officer. By virtue of his employment, respondent is a safety member of CalPERS.

2. On September 27, 2019, respondent filed an application for service retirement pending industrial disability retirement (application) on the basis of right ankle and foot conditions.

3. CalPERS requested and received medical reports concerning respondent's right ankle and foot conditions and obtained an independent medical evaluation (IME) from Steven H. Silvers, D.P.M. After reviewing the reports, CalPERS determined that respondent was not disabled nor substantially incapacitated from performance of his duties as a Correctional Officer with the Department of Corrections.

4. By letter dated March 20, 2020, respondent was notified of CalPERS's determination and advised of his appeal rights. Both the Department of Corrections and State Compensation Insurance Fund were copied on the letter.

5. Respondent filed a timely appeal.

6. On September 18, 2020, Keith Riddle, in his official capacity as Chief, Disability and Survivor Benefits Division, CalPERS, executed a Statement of Issues against respondent and the Department of Corrections.

7. The issue on appeal is limited to whether respondent, at the time of the application, was substantially incapacitated from performance of his usual and

customary duties as a Correctional Officer for the Department of Corrections based on his right ankle and foot conditions.

Duties of a Correctional Officer

8. CalPERS submitted two exhibits that describe the duties of a Correctional Officer: (1) a Post Order, which includes a list of essential functions and (2) a Physical Requirements of Position/Occupational Title form. Both are described in pertinent part below.

9. The Post Order states that Correctional Officers "have the responsibility to take appropriate action during an emergency (including physical restraint) irregardless of [the] assignment." (Exh. 9, p. 1.) Under "Typical Tasks," the Post Order lists various duties and includes, in part, disarming and subduing inmates in a correctional institution; running to the scene of a disturbance or emergency; supervising the conduct of inmates; standing watch; walking or standing for long periods of time; running up or down stairs; searching for and recapturing escaped inmates; carrying, lifting or dragging heavy objects such as a disabled or unconscious inmate/staff; and performing patrol duties. (*Id.* pp. 1-2.)

10. The Physical Requirements of Position/Occupational Title form describes the physical activities of a Correctional Officer as including: (1) sitting, standing, walking, and lifting/carrying up to 25 pounds constantly over six hours per day; (2) climbing, lifting/carrying up to 50 pounds, and driving and walking on uneven ground frequently between three to six hours per day; and (3) running, crawling, kneeling, squatting, and lifting/carrying up to 100 pounds occasionally up to three hours.

Expert Opinion

11. At the request of CalPERS, Dr. Silvers, who is certified with the American Board of Podiatric Surgery, conducted an IME of respondent on February 18, 2020, and issued a report of his findings. Dr. Silvers testified at hearing as to the contents of his report.

12. At the time of the examination, respondent reported having frequent to near constant paresthetic-type pain of the lateral aspect of the right ankle that radiated to his fourth and fifth toe; burning pain in the lateral midfoot, which radiates medially to the top of the right midfoot; lateral aching pain about the right foot; and peroneal muscle cramps during sleep. These symptoms were exacerbated by moderate-to-prolonged periods of weightbearing.

13. During the examination, Dr. Silvers noted respondent demonstrated positive Tinel's sign with percussion of the right ankle joint, had a moderate limp (antalgic pattern) when walking, and an inability to perform an independent heel raise of his right lower extremity. Dr. Silvers found that there was some discrepancy during his examination in that respondent "demonstrated non-weightbearing muscle strength of 5/5 with regard to ankle joint plantar flexion bilaterally. Yet, he demonstrated significant difficulty in performing an independent right lower extremity heel raise." (Exh. 7, p. 21.) Dr. Silvers noted that respondent's symptoms would not ordinarily limit the ability to perform the heel rise.

14. Dr. Silvers opined that respondent did "not have an impairment that rises to the level of substantial incapacity to perform their usual job duties." (Exh. 7, p. 21.) Dr. Silvers' opinion was based on his examination of respondent and his review of the following documents: (1) respondent's disability application; (2) the medical records of

the treatment respondent received following his injury; (3) the documents describing respondent's job duties described above in Factual Findings 9 and 10; and (4) the subrosa (surveillance) video taken of respondent between December 16, 2019, and January 7, 2020, with the accompanying January 14, 2020 report of investigation. According to Dr. Silvers, respondent would have "some difficulty in performing certain tasks, but does not meet the threshold or demonstration of substantial incapacity." (*Ibid.*)

15. Dr. Silvers noted that the investigative report and surveillance video carried "substantial weight" in forming his opinion regarding respondent's current medical status. (Exh. 7, p. 22.) Dr. Silvers noted that there were specific activities respondent performed which he did not consider to coincide with substantial incapacity. The instances included video of respondent: (1) carrying an extension ladder, which weighs approximately 35 pounds; and (2) climbing and straddling the ladder without apparent difficulty. Dr. Silvers also found it significant that respondent was seen on the video carrying the ladder in his right upper extremity. Dr. Silvers opined that "if the right lower extremity was in fact significantly impaired, an individual would be expected to carry the ladder in his left upper extremity in order to alter [the] center of gravity to his left/uninjured side." (*Id.* p. 21.)

16. On May 1, 2020, CalPERS provided Dr. Silvers with two other medical reports, one prepared by Tate Gordon, P.A., dated October 31, 2019 stating that respondent's condition was moderate and unchanged that respondent was unable to work. The other report prepared by Mark Bernhard, D.O. dated February 10, 2020 stated that respondent's muscle strength levels were five out of five, there was a loss of amplitude in the peroneal motor nerve consistent with mild axonal neuropathy of the right peroneal nerve, and that respondent was unable to work as a Correctional

Officer as restrictions would include standing no more than one hour, no walking on uneven ground, and no jumping or running. Review of the reports did not change Dr. Silvers' opinion on respondent's disability status.

17. At the hearing, Dr. Silvers stressed the importance of the surveillance video in coming to his decision on substantial incapacity. Dr. Silvers noted that respondent presented with a limp during the gait examination. Dr. Silvers opined that if respondent had a "true limping gait," respondent would not have been able to perform the activities he performed in the surveillance video. Dr. Silvers further noted that Dr. Bernhard's findings were not inconsistent with his findings, but that Dr. Bernhard found substantial incapacity, which was not his impression.

Respondent's Testimony

18. Respondent has been a Correctional Officer at the Department of Corrections between 2006 and 2017. As a Correctional Officer, he was routinely required to work 16-hour shifts. Respondent's job would also require him to stand or walk for extended periods of time. In addition, when there is an emergency, respondent would have to respond, often having to run to the yard where the incident was occurring.

19. Respondent continues to experience numbness and cramping in the outer two toes of his right foot. During the day, he has pain in his foot when he stands or walks for long periods of time. Due to these issues, he does not believe he could be able to run and respond to emergencies when they occur. Respondent asserts that his limitation prevents him from being an effective officer and his continued employment would make him a liability, placing himself and others at risk.

20. Respondent is aware of the surveillance video. Respondent asserted the characterization of some of his activities in the surveillance video, which had not been submitted into evidence, was inaccurate. For example, Dr. Silvers indicated that respondent was seen "jumping down approximately 18 [inches] from his RV." (Exh. 7, p. 19.) Respondent noted that that was in error. The flower beds obscured the steps that were in front of the house in the video. Respondent noted that he did not, in fact, jump down but rather walked down the steps.

21. As to some of the other activities, respondent explained that he sold his house and prepared to move to Tennessee after his worker's compensation had run out. To do that, he had to prepare the motor home. Respondent worked when he felt well, then would rest, often having to ice his foot. This is not something he would be able to do as a Correctional Officer.

Findings Regarding Respondent's Disability

22. Dr. Silvers is a board certified in podiatric surgery and is familiar with CalPERS requirements for industrial disability retirement requirements and understands the difference between prophylactic work restrictions and presently existing disability. Accordingly, Dr. Silvers' testimony is afforded weight. Dr. Silvers' reports and testimony support a finding that respondent is able to actually and presently perform the essential functions of a correctional officer. While respondent's testimony regarding his job duties was persuasive, he did not present any medical evidence that would establish that he is substantially incapacitated from the performance of his usual duties as a correctional officer by reason of a right ankle/foot condition. Accordingly, the totality of the evidence established that while respondent's condition is work related, he is not substantially incapacitated from performing his usual duties as a correctional officer for the Department of Corrections.

LEGAL CONCLUSIONS

1. An applicant for an industrial disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) As such, the burden rests with respondent to prove by a preponderance of the evidence that he is permanently disabled or incapacitated from performance of his duties as a correctional officer.

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.] The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.)

Applicable Law

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.)

4. A state safety member of CalPERS shall be retired for disability regardless of age or amount of service if incapacitated for the performance of duty as the result of an industrial disability. (Gov. Code, § 21151, subd. (a).) A CalPERS member may file an application for disability retirement (Gov. Code, § 21152) while in state service, within four months after the discontinuance of state service or while on an approved leave of absence, or while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application (Gov. Code, § 21154).

5. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as a basis of retirements as "disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion."

6. "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service." (Gov. Code, § 21151.)

7. "Incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or disability. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Substantial inability to perform one's usual duties must be measured by considering the applicant's present abilities; disability cannot be prospective or speculative. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.)

Evaluation

8. Respondent failed to prove by a preponderance of the evidence that he is substantially incapacitated to perform his usual and customary job duties, and is therefore ineligible for a disability retirement. The only medical evidence in this case was Dr. Silvers' reports and testimony at hearing. Dr. Silvers testified that his medical opinion, after performing an independent examination of respondent and reviewing the documents provided to him, is that respondent is not "substantially incapacitated." He provided objective observations which formed his opinion that respondent's complaints to his right ankle/foot did not render him substantially incapacitated to perform the duties of his position as a Correctional Officer.

9. Respondent, as the party with the burden of proof, failed to present any medical evidence to establish that his condition rendered him incapacitated from performing his usual duties of a Correctional Officer.

ORDER

1. The decision of CalPERS is affirmed.

DATE: Aug 18, 2021


Nana Chin (Aug 18, 2021 09:58 PDT)

NANA CHIN

Administrative Law Judge

Office of Administrative Hearings